JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 848

NICK C. SPANOS, *Petitioner*,

vs.

GILBERT CARTER, TRUSTEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on January 22, 1958.

OPINIONS BELOW.

The opinion of the Court of Appeals, not yet reported, appears as Appendix A. The findings of fact, conclusions of law and opinion of the District Court, also unreported, appear as Appendix C, and also at Record 21-28, inclusive.

JURISDICTION.

The judgment of the Court of Appeals was entered January 22, 1958 (Appendix B). The jurisdiction of this court is invoked under 28 U.S.C.A., Section 1254(1).

QUESTIONS PRESENTED.

Jurisdiction of a Federal District Court was invoked to determine a single question of fact. The fact to be determined was, what amount of money constitutes a "fair and reasonable" attorneys' fee for legal services rendered in certain antecedent litigation? An employment contract between attorney and client specified that, after computing a contingent fee of one-third of the net amount recovered (concerning which there is no dispute), there should be added, if the litigation was compromised after trial had commenced, which was what occurred, a further amount not exceeding 6-2/3 per cent of the net recovery as shall be "fair and reasonable", taking into consideration the "stage" to which the trial had proceeded and the "amount recovered".

The District Court found that the amount of increase that was "fair and reasonable" is 5-1/3 per cent which, applied to the amount of net recovery, is $24,378.71, for which judgment was rendered in favor of petitioner.

Two classes of evidence were received and considered by the District Court consisting of (1) the entire record in the antecedent litigation, and (2) expert testimony. None of the record in the antecedent litigation was included in the transcript laid before the Court of Appeals. The Court of Appeals did not declare any finding or conclusion of the District Court "clearly erroneous". It conceded that the question submitted to the District Court "was deter-

minable by the informed judgment of the experienced judge, applying the limitations and criteria of the contract". The Court of Appeals then declared: "we hold, on consideration of the matters the contract requires to be considered, that amount is and should be declared to be the sum of $6,000.00." So holding, it re-wrote the judgment, using the figures deemed by it appropriate and as so amended affirmed the judgment.

On this petition for writ of certiorari, petitioner contends and asks the judgment of this court on the following propositions:

(1) Under the Federal Rules of Civil Procedure, and particularly under Rule 52(a), is not the fact-finding function in non-jury and jury-waived cases in the Federal courts vested exclusively in the Federal District Courts, subject only to the power of the reviewing court to set same aside where they are "clearly erroneous"? If the findings are "clearly erroneous" and for that reason are set aside, must not the case be remanded to the District Court so that it may exercise its exclusive fact-finding function in the light of the new illumination shed on the case by the reviewing court?

(2) Where the reviewing court does not declare the findings clearly erroneous and does not otherwise indicate why or wherein they are clearly erroneous but merely asserts that in its opinion a different amount is the "fair and reasonable" attorneys' fee, must it not be deemed to have merely substituted its views on the facts for the views of the trial judge? Is this the exercise of the reviewing function to declare findings "clearly erroneous" or is this the exercise of the function of trying the facts of the case *de novo*?

(3) In view of the provisions of the Federal Rules of Civil Procedure authorizing Federal District Courts to

employ pre-trial procedure to limit, define, dispose of and settle both issues of fact and law, can the Court of Appeals lawfully refuse to recognize that the "stage" to which the trial had proceeded includes a consideration of the pre-trial proceedings? Under the Federal Rules of Civil Procedure, are not issues of law or fact disposed of by pre-trial proceedings in the Federal courts a part of the trial process in those courts?

(4) Even if under the Federal Rules of Civil Procedure the Court of Appeals can be deemed vested with power to make new findings of fact, can it lawfully exercise such power where it appears that important and controlling evidentiary facts considered by the District Court are not before the reviewing court?

STATUTES INVOLVED.

The portions of the Federal Rules of Civil Procedure (Title 28, U.S.C.A.) deemed appropriate are set forth in Appendix D. They include Rules 16 and 52(a).

STATEMENT OF THE CASE.

Federal Jurisdiction —

Federal jurisdiction of the District Court is based on diversity of citizenship under Title 28, U.S.C.A., Section 1332. The District Court found the necessary jurisdictional facts to exist (Supp. R. 21). No challenge of federal jurisdiction was made on appeal.

Employment Contract —

Mabel K. Carter, Trustee, on October 27, 1952, by written contract (R. 15-19) engaged the legal services of Wm. G. Boatright, an attorney-at-law of Kansas City, Missouri;

Ewing, Ewing & Ewing, a law partnership of Nevada, Missouri (respondent's firm), and Nick C. Spanos, of the Los Angeles, California, bar. The attorneys were employed to prosecute suit against eight producers and distributors of motion pictures to recover damages under Section 4 of the Clayton Act (Title 15, U.S.C.A., Section 15) for violations of Sections 1 and 2 of the Sherman Anti-Trust Act (Title 15, U.S.C.A., Sections 1 and 2). This antecedent litigation is referred to in the record and hereafter as the "Carter case". Pursuant to such employment, suit was brought in the United States District Court for the Western District of Missouri, Western Division, on December 9, 1952. Thereafter, before termination of the litigation, Mabel K. Carter died and respondent was appointed successor trustee and substituted as plaintiff.

The compensation of the attorneys for their services was to be on a contingent basis. Missouri law, Section 484.140, R. S. Mo. 1949, specifically sanctions such contract. Paragraph 3 of the employment contract under which this controversy arose provides as follows:

> "3. If the claim or cause of action be compromised and settled after intensive preparation for trial has been made but before judgment, the attorneys' fees shall be one-third of the net amount recovered and collected, *provided, however,* that if such compromise and settlement occurs after trial has commenced the attorneys' fees shall be increased by such amount, not exceeding 6-2/3 per cent of the net amount recovered and collected, as shall be fair and reasonable, taking into consideration the stage to which the trial has proceeded and the amount recovered and collected by compromise and settlement." (Italics ours).

Amount Recovered —

The cause of action was compromised and settled after intensive preparation for trial had been made and after

trial had commenced but before judgment. The gross amount recovered by compromise and settlement was $600,000. Expenses in the Carter case were $10,192.28. The net recovery for the client, before deducting attorneys' fees, was, therefore, $589,807.72.

No dispute exists as to the right of the attorneys to be paid one-third of this amount of net recovery. The dispute, and the only dispute, is as to the amount by which the one-third should be increased under paragraph 3 of the contract quoted above, which requires that there shall be an increase of not exceeding 6-2/3 per cent of the net recovery as is "fair and reasonable", taking into consideration the "stage" to which the trial has proceeded and the "amount" recovered by compromise and settlement. 6-2/3 per cent of the net amount recovered is $31,456.41. The parties made an arrangement whereby that amount was deposited with Commerce Trust Company to await determination of the issue.

Evidence on Which District Court Based Its Findings —

The Carter case was filed, prosecuted and disposed of in the same District Court and before the same district judge as the instant case. Consequently, the District Court had actual, intimate and first-hand knowledge not only of the results obtained in the Carter case but of the effectiveness of all steps taken in the prosecution of the Carter case. But, so that the same knowledge and information might be available to any reviewing court, the District Court by pre-trial order and by stipulation of the parties made the record in the Carter case part of the evidence in this case.

The pre-trial order is set out in full at pages 1 to 17, inclusive, of the Supplemental Record. In the pre-trial order, the District Court called particular attention to the

pre-trial proceedings in the Carter case. It called attention to the fact that there had been six separate pre-trial conferences; that the official transcript of these pre-trial proceedings consisted of 299 pages, "all of which have been transcribed by the official court reporter" and are "made a part of these stipulated facts" (Supp. R., pp. 9, 10). The court then declared:

> "At these pre-trial conferences, *many questions* of fact and law were discussed, *resolved and disposed of.*" (Italics ours).

The court further called attention to other portions of the record in the Carter case, including the following:

1. Depositions of 11 witnesses taken in Kansas City, Missouri, and in New York, the transcript of their testimony consisting of 2125 pages;
2. Motion for summary judgment filed by defendants; numerous briefs filed in connection therewith resulting in an opinion of the District Court which is officially reported as "Carter v. Twentieth Century-Fox Film Corp. et al., 127 F. Supp. 675";
3. The 405 exhibits which "were produced, identified and marked as exhibits, agreed to or objections made or objections reserved", all in the pre-trial proceedings;
4. The official transcript of the proceedings of the trial before the jury, Volumes 7, 8, 9 and 10; and
5. The 60 exhibits offered in evidence before the jury.

The District Court also noted other proceedings in the Carter case such as pleadings, motions and briefs (which we do not now enumerate) and, having specifically made the pre-trial proceedings in the Carter case a part of the evidence in the instant case (Supp. R. 10), further ordered (Supp. R. 16) that either party might refer to any other

part of the record or proceedings in the Carter case not specifically enumerated.

In this manner the whole of the record in the Carter case was received and became part of the evidence in the instant case and constituted part of the evidence on which the District Court based its findings of fact as to what amount of money constituted a "fair and reasonable" attorneys' fee within the limits of the contract.

In addition to having the entire record in the Carter case before him and his first-hand knowledge of what that record meant, the district judge also received and considered expert testimony given by the lawyers who represented the plaintiff in the Carter case; by the lawyers who represented the defendants in the Carter case, and respondent's own views. All the expert testimony, except that of respondent, was in accord with the ultimate conclusion reached by the District Court.

Basis of Trial Court's Findings —

The District Court found as a fact that the $600,000 represented maximum recovery in the Carter case. The court stated in its findings that

> "the amount recovered and collected in compromise and settlement thereof fairly represented the amount of actual damages that the plaintiff in the Carter case sustained to the business and property of the Liberty Theatre, in Sedalia, Missouri, as such actual damages were subject to being trebled by reason of things forbidden by the anti-trust laws of the United States." (R. 22).

And again on the same subject the court said (R 25):

> "* * * reluctant though he (Carter) be to admit it, the fact is, that the sum received in settlement thereof is and was tantamount to the total judgment that the

plaintiff in the Carter case could reasonably have expected, or that the plaintiff therein was entitled to receive, even had judgment been entered on a verdict of the jury in favor of the plaintiff in that litigation".

Having reached the factual conclusion, that maximum recovery had been had after trial had commenced but before submission of the case to the jury and that the contract required under those circumstances that the fee of 33-1/3 be increased by an amount not exceeding 6-2/3 per cent, "taking into consideration the *stage* to which the trial has proceeded and the *amount* recovered", the court said (R. 27):

> "That presents a question of fact that must be resolved by the court without doing violence to any of the terms of the contract between the parties."

The court then considered and rejected respondent's contention that the employment contract provided merely a per diem to be paid to counsel after commencement of the jury trial in the Carter case.

> "The provision of that contract providing as it does for the payment of an increased amount of attorneys' fees after trial had commenced, must be construed with the intent of the parties as expressed and made manifest in the contract, considered as a whole. When so considered, it clearly appears that the attorneys' fees earned thereunder were to be considered in totality, as one lump sum, and not by services performed by counsel piecemeal. It was the total legal services rendered by counsel to plaintiff in the Carter case that entitled counsel to a contingent fee when 'the amount recovered and collected by compromise and settlement' was paid, and not merely things done by them before or after trial of that case had commenced."

The court then declared (R. 27, 28):

> "We think that matter should be resolved by taking into consideration that it is here clearly established

> that *but* for the continuance of the trial of the Carter case to a point of submission of that case to a jury, all factors are shown to exist which entitle counsel, by the terms of their contract, to a contingent fee earned of 40 per cent of the amount recovered and collected by compromise and settlement thereof. That being so, then the only logical conclusion to be reached because the Carter case lasted only two days, is that the attorneys' fees earned under the contract over and above 33-1/3 per cent, must be reduced by a reasonable percentage of that per cent not earned because the trial did not reach the jury. Without any specific equation for determining that matter, I think that the amount of attorneys' fees not so earned under the contract is to be reasonably fixed at 1-1/2 per cent by which the total attorneys' fee under the contract was to be increased over and above 33-1/3 per cent." (Italics ours).

Basis of Court of Appeals' Findings —

The Court of Appeals did not question the finding of the District Court that $600,000 represented maximum recovery. It recognized that a question of fact was presented to the District Court and that the duty devolved upon the District Court to determine what part of the 6-2/3 per cent was in fact earned. It agreed that this question of fact

> "was determinable by the informed judgment of the experienced judge, applying the limitations and criteria of the contract. The fixing of fair and reasonable fees for attorneys' services is a function he performs year in and year out during his term of service.
>
> * * * We agree with the court that there would be no fairness in awarding the attorney an ordinary, or even somewhat larger than ordinary, trial per diem. His was expected to be and was an extraordinary service by an unusual expert and his pay for conducting the trial was expected to be on a commensurate scale.

On the other hand the contract limits the amount to be added to the basic fee, by requiring that the stage to which the trial had proceeded be taken into consideration. As the trial was terminated and the case dismissed at a very early stage, the amount of the increase to be made to the established 1/3 must be fixed at an amount less than 6-2/3 per cent of the recovery, which is fair and reasonable for the service to which it is related. We hold, on consideration of the matters the contract requires to be considered, that amount is and should (be) declared to be the sum of $6,000."

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

The Court of Appeals—

(1) has rendered a decision in conflict with the decision of the Ninth Circuit on the meaning and application of Rule 52(a), and

(2) has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's supervisory power.

The questions presented by this petition are of fundamental importance in the administration of justice under the Federal Rules of Civil Procedure. This court has never dealt with these contentions in a definitive manner; indeed our research reveals only four cases in this court that have touched some facet of the problem. Both bench and bar are in need of a comprehensive clarification of the questions here presented.

Rule 52(a) vests the fact-finding function exclusively in the Federal District Courts in all jury waived and non-jury cases and directs the District Court to find the facts specially and state separately its conclusions of law. The

Rule further provides that findings of fact are not to be set aside unless "clearly erroneous" and due regard is to be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Without any authority many of the Courts of Appeal, except the Ninth Circuit, have expressly or tacitly adopted the view that the clearly erroneous standard means that, if the reviewing court determines that the findings are clearly erroneous, then it may proceed to make new findings of fact and render judgment accordingly—in short, review the case *de novo* as under former equity practice. See *United States* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377, 76 S. Ct. 994. One has only to look at the tremendous volume of cases listed in U.S.C.A., under Rule 52(a), to appreciate the impact of the reviewing power on the fact-finding function. One will be immediately impressed with the complete lack of stability of fact findings by Federal District Courts. A disinterested observer could well conclude that the Federal District Court in the exercise of its fact-finding function is a mere whistle-stop on the way to the Court of Appeals.

Such procedure is not only unwarranted and does violence to Rule 52(a) but strikes a serious blow at the fact-finding system sought to be set up and maintained by the Federal Rules of Civil Procedure. It was contemplated that under the new Rules the fact-finding function, when performed by the District Court, would have the same sanctity as a jury verdict, save and except that the reviewing court was given the power to set aside a finding of fact if clearly erroneous—but it was not given any other power in that connection.

With the exception of the Ninth Circuit, other Courts of Appeal not only claim the right to exercise the fact-finding power, as did the Eighth Circuit in the instant

case, but a number assert that, where the trial court's findings deal with conclusions upon undisputed facts or stipulated facts, the reviewing court is not bound by Rule 52(a) at all.

Thus, the Third Circuit in *Sears, Roebuck & Co.* v. *Johnson*, 219 F. 2d 590, asserted (l. c. 591):

> "* * * this court is not bound * * * by Rule 52(a) * * *. Rule 52(a) is not applicable where, as here, the dispute is not as to the basic facts, but as to what inference (i. e., ultimate fact) should reasonably be derived from the basic facts."

The Fifth Circuit, in *Daniel* v. *First National Bank*, 228 F. 2d 803, asserts that it is

> "free from the restraint of the clearly erroneous rule with respect to the District Court's findings of ultimate fact."

Such assertions would seem to be in the teeth of the pronouncements of this court in *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, 68 S. Ct. 525.

The Ninth Circuit, in its most recent decisions, has rejected all of these unwarranted excursions into the exclusive fact-finding function of the Federal District Courts. Thus, in *Randall Foundation* v. *Riddell*, 244 F. 2d 803 (9th Cir.), it is stated (l. c. 805):

> "Appellant urges that, since there is a written stipulation as to certain facts, this court must disregard the findings of the trial court and decide the case on our interpretation of the documents. Some courts have presumed to state such a rule where the evidentiary facts are entirely based upon stipulation or documents. Even there, an unwarranted circumscription of the powers of the trial judge is involved. Furthermore, the appellate court would assume thereby the power of making findings of fact, which passed

> out of the federal system with the abolition of trials de novo. The appellate courts of the federal system have such power neither inherently nor by grant, express or implied. The Rules say that the findings of fact of the trial judge shall not be set aside unless clearly erroneous, and no exception is made as to facts found based upon writings."

And, in *Smallfield* v. *Home Insurance Co. of New York*, 244 F. 2d 337 (9th Cir.), certain findings were held clearly erroneous because of erroneously admitted evidence. It was insisted that the reviewing court proceed to make new findings. The court declined, saying (l. c. 341):

> "While the trial court could have made the same finding on the evidence which was properly admitted, it did not do so, and we cannot say that it would have done so. This court lacks the power to make new findings of fact and for us on appeal to assume that if the trial court had limited itself to consideration of only the evidence which was properly received it would have made the same finding is tantamount to making a new finding."

It is only by a painstaking observance of the respective functions to be performed by the District Courts and by the appellate courts that they can make their most effective contribution to the administration of justice under the Federal Rules of Civil Procedure. In all cases the District Court is in a better position to make specific findings of fact than is any reviewing court and that is true regardless of whether the findings are based wholly or largely on undisputed facts or documentary evidence or on oral testimony. The District Court has a different procedural approach which is conducive to fact finding—it is not present in the reviewing court.

The phrase "clearly erroneous" does not mean a difference of opinion or of choice of one of several possible con-

clusions from a particular fact situation. Something far different is involved. Unless the Court of Appeals can specify a factual or legal consideration that makes a particular finding of fact clearly erroneous, then it is not clearly erroneous. Factual or legal reasons must be given which one learned in the law can recognize, appreciate and understand.

When the reviewing court, as here, asserts that the question of fact "was determinable by the informed judgment of the experienced judge, applying the limitations and criteria of the contract" and that "the fixing of fair and reasonable fees for attorneys' services is a function he performs year in and year out during his term of service" and then goes on to assert, "we hold, on consideration of the matters the contract requires to be considered, that amount is and should (be) declared to be the sum of $6,000," *the court has not found any finding to be clearly erroneous but it has done what all the courts say should not be done, namely, substituted its views for the views of the trier of the facts.* That the District Court could have found some other amount to be fair and reasonable or that the reviewing court might perhaps have done so, if it had been the initial trier of the facts, does not alone entitle the reviewing court to set aside the findings. There must exist a stronger basis for overthrowing a finding of fact than a mere difference in personal judgment.

In *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 70 S. Ct. 177, this court declared that where the judgment of the District Court is supported by an opinion prepared with obvious care which analyzes the evidence and where the evidence would support a conclusion either way, but the trial court has decided to weigh it more heavily in favor of one litigant, "such a choice between two permissible views of the weight of the evidence is not clearly erroneous."

The Court of Appeals declined to recognize that the stage to which the trial had proceeded required a consideration of the pre-trial proceedings. It professed to agree with the District Court that the amount of the increase could not be determined by fixing a per diem allowance. Nevertheless, it proceeded to do just that. Having noted that the jury trial continued for only two days and that the character of the case and the qualifications of the attorneys entitled them to more than a generous per diem, it fixed the amount of increase at $6,000. In doing so, it did complete violence to the whole purpose and intendment of the pre-trial proceedings in the Carter case.

Judge Albert A. Ridge of the Federal District Court for the Western District of Missouri, has developed the processes of pre-trial procedure to such a point that in any important case in his court it is virtually tried before the jury is empaneled. What is left for the jury to consider is the minimum. That was the situation in the Carter case.

But the Court of Appeals, confronted with a contract which plainly says that the amount of the increase shall take into consideration the "stage" to which the trial had proceeded, ignored and gave no effect to the pre-trial proceedings. The stage to which the trial had proceeded in the Carter case required a consideration of the numerous questions of law and fact that were resolved and disposed of in six separate pre-trial proceedings, none of which was laid before the Court of Appeals. In this situation the Court of Appeals could not possibly have as comprehensive an understanding of how narrow the issues were when the jury was empaneled nor how many questions of fact and law had already been decided, resolved and disposed of as did the District Court. Without this knowledge the Court of Appeals could not adequately appraise the stage to which the trial had proceeded at the

time it was terminated. Under the Federal Rules of Civil Procedure the pre-trial procedure in the Federal District Courts is an important and fundamental part of the trial process. The Court of Appeals has ignored it by taking the view that a generous per diem was adequate compensation, all in the face of the contract and the intention of the parties.

Finally, undertaking to make new findings of fact with only a fragmentary part of the total evidence considered by the District Court constitutes a grave departure from the accepted and usual course of judicial proceedings which alone calls for this court's supervisory power.

However wide the power of the reviewing court to make new findings of fact may be, certainly no reviewing court can lawfully undertake to substitute its findings for those made by the District Court in the absence of the same evidentiary information as was before the District Court. It is obvious from a reading of the District Court's findings, conclusions and addendum memorandum that it was dealing with a situation in which the pre-trial proceedings in the Carter case had an important bearing on the question of the stage to which the trial had proceeded.

CONCLUSION.

It is important to the administration of justice in the Federal courts that the decision below be reviewed and reversed by this court. It is time that the misapplication of Rule 52(a) be effectively halted. The sanctity of the exclusive fact-finding function of the Federal District Courts must be preserved.

Respectfully submitted,

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APPENDIX A.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,857

Gilbert Carter, Trustee, Appellant,
v.
Nick C. Spanos, Appellee.

Appeal from the United States District Court for the Western District of Missouri.

[January 16, 1958.]

Gilbert Carter, Pro Se.

Terence M. O'Brien for Appellee.

Before GARDNER, Chief Judge, and WOODROUGH and VAN OOSTERHOUT, Circuit Judges.

WOODROUGH, Circuit Judge.

This appeal is prosecuted from a declaratory judgment of the court without a jury, adjudicating a dispute between attorney and client as to the amount of an increase that should be made to a contingent fee, which increase is due under a written contract of employment dated October

27, 1952. It was undisputed that the attorney was entitled by the terms of the contract to receive some increase in the fee, over and above the ⅓ of the amount he recovered by settlement, which ⅓ is agreed to and provided for. The dispute was only as to the amount of the increase over the ⅓.

The attorney and other attorneys associated with him in the contract had brought an action on behalf of their client for the recovery of treble damages under the anti-trust acts, entitled *Mabel K. Carter, Trustee* v. *Twentieth Century-Fox Film Corporation, et al.*, and prosecuted the same with skill and diligence so that on February 28, 1955, they obtained an offer in writing from the defendants in the action to settle the claims and demands of the plaintiff for $600,000.00.

The client was prepared to accept but a dispute arose over the attorneys' fee. The terms of the employment contract as to the attorneys' fee were that:

> "2. If the claim or cause of action be compromised and settled either before or after filing of suit but before intensive preparation for trial has been made, the attorneys' fees shall be one-fourth of the net amount recovered and collected."
>
> "3. If the claim or cause of action be compromised and settled after intensive preparation for trial has been made but before judgment, the attorneys' fee shall be one-third of the net amount recovered and collected, provided, however, that if such compromise and settlement occurs after trial has commenced the attorneys' fees shall be increased by such amount, not exceeding 6⅔ per cent of the net amount recovered and collected, as shall be fair and reasonable, taking into consideration the stage to which the trial has proceeded and the amount recovered and collected by compromise and settlement."

"4. If the claim or cause of action be tried and final judgment recovered, the attorneys' fee shall be one-third of the net amount (exclusive of attorneys' fees allowed by the court and assessed against the defendants) recovered and collected plus the full amount allowed by the court and assessed against the defendants and recovered and collected as attorneys' fees under Section 15, Title 15, U.S.C.A."

Before acceptance of the $600,000.00 settlement was agreed to, a supplemental agreement in writing was executed by the attorneys and client on March 4, 1955, which stated the dispute that had arisen between them concerning the attorneys' fee in the words and figures as follows:

"3. A dispute exists between the parties as to the proper interpretation and application of the provision of the original contract of October 27, 1952, which provides: 'that if such compromise and settlement occurs after trial has commenced the attorneys' fees shall be increased by such amount, not exceeding 6⅔ per cent of the net amount recovered and collected, as shall be fair and reasonable, taking into consideration the stage to which the trial has proceeded and the amount recovered and collected by compromise and settlement.' It is the contention of first party that second party's fee should be computed on the basis of something less than 40 per cent (but something more than 33⅓ per cent) and it is the contention of second party that the fee should be computed on the basis of 40 per cent. * * *."

It was a condition of the offer of settlement of the *Carter* case that other offers made by the defendants to settle other cases being prosecuted by the attorney, Mr. William G. Boatright, should be accepted simultaneously and all acceptances were not immediately forthcoming so that a jury trial of *Carter* v. *Twentieth Century-Fox Film Corporation* was entered upon on Wednesday morning,

March 2, 1955. A jury was empanelled and about 4:00 P. M. on Thursday, the second day, the court recessed the trial until the following Monday. In the meantime the *Carter* treble damage suit was settled for the agreed amount of $600,000.00 and the action was dismissed.

The supplemental contract of March 4, 1955, entered into after the offer of settlement had been made, fixed and defined in dollars and cents and installments the amounts of the fee agreed by all parties to be payable to the attorneys upon consummation of the settlement, under that provision of the employment contract which called for "one-third of the net amount recovered and collected if the claim or cause of action be compromised and settled after intensive preparation for trial has been made, but before judgment."

The dispute above defined was left for adjudication in this case. It was brought by a successor in interest of the attorney against a successor in interest of the client and the custodian of a trust fund derived from the settlement. The court was called upon to adjudicate and declare what constituted the fair and reasonable amount not exceeding 6⅔ per cent of the net amount recovered and collected by which the attorneys' fee should be increased. above the established one-third, by reason of the fact that the settlement occurred after trial had commenced, taking into consideration the stage to which the trial had progressed and the amount that had been received and collected by compromise and settlement.

At the conclusion of the trial of this case, the court filed its opinion in writing accompanied by findings of fact and conclusions of law and entered declaratory judgment, which disposed of the controversy that was submitted by allowing an increase of attorneys' fees of 6⅔ per cent of the net amount recovered and collected on the settlement over

and above the 33⅓ per cent thereof, reduced by a deduction from that allowance of 1½ per cent of said net recovery. Otherwise expressed, the whole fee was figured at 40 per cent of net recovery (33⅓ per cent, plus 6⅔ per cent) and reduced by 1½ per cent, leaving it at 38½ per cent of the net recovery.

The district court refused to sustain the contention which the attorney made in that court and has repeated on this appeal, that the "fee should be computed on the basis of 40 per cent of the net recovery" and that the full increase of 6⅔ per cent should be added to the established ⅓, on account of the attorney service at the trial. The net recovery from the settlement of the case was $589,807.72, and the fee of ⅓ as established was $196,602.57, so that an increase of 6⅔ per cent would have added to it the sum of $39,320.51. We find no error in the court's refusal to allow that amount to be added to the $196,602.00 already agreed to and provided for.

But it appears on consideration of the court's findings, conclusions and opinion, taken together (Rule 52(a) Federal Rules of Civil Procedure, 28 U.S.C.A.), that the court approved in large measure the position taken for the attorneys that the compensation to be ultimately paid to them, including the increase here in issue, should be such an amount as would be "fair and reasonable payment for all legal services rendered in connection with the institution and prosecution of the claim and cause of action * * * considered as a whole and not fractional". It was contended that such "reasonable payment" would result from allowance of the full 40 per cent of the recovery.

The court made painstaking and earnest effort to solve the problem before it, in such a way as to accomplish reasonable payment for all the services, and the judgment entered was, to the effect, that 40 per cent less a deduction

of 1½ per cent of the net amount of the settlement, or 38½ per cent thereof, was declared to be the amount of the attorneys' fee.

It is contended for the client that the court erred in interpreting and applying the employment contract and that the increase of the amount of the attorneys' fee, which it declared over and above the established ⅓, was excessive.

The issue presented in this case involved only the application of the unambiguous attorneys' fee contract. It was binding and to be enforced in accord with its terms and substantially uncontradicted facts because Missouri law, Section 484.40 R. S. Mo., 1949, specifically sanctions such a contingent fee contract. There was no pleading that the compensation which the contract provided for the attorneys was fair and reasonable in its entirety and no attempt to recover on it as upon quantum meruit. We do not hold that the services would have supported recovery in the agreed amount on quantum meruit. Cf., *Twentieth Century Fox Film Corporation* v. *Brookside Theatre Corporation*, 8 Cir., 194 F.2d 846. The contract plainly singled out the trial of the case by the attorney who was employed as a distinct and special service to be paid for on a different basis than intensive preparation and other services. The contract recognizes stages in the trial as a factor in measuring the fee for conducting the trial. If the attorneys had carried the trial through all stages, they would have been entitled to their 6⅔ per cent increase of fee regardless of the offer of settlement and its acceptance before the trial commenced, or the time it took, or the amount realized. But the case was dismissed while the trial was in a very early stage. In consequence, the duty devolved upon the court to determine what part of the 6⅔ per cent was in fact earned. To that end the contract required that the amount of recovery be taken into con-

sideration, also the stage to which the trial had proceeded, and a fair and reasonable increase of fee above the ⅓ determined accordingly. There was an estimate, that could not be more than a reckless guess, that the trial would have taken about twelve days, but there is no thought or contention that the meaning of "fair and reasonable" as to this element of the contract is determinable merely by division of "two into twelve". It was determinable by the informed judgment of the experienced judge, applying the limitations and criteria of the contract. The fixing of fair and reasonable fees for attorneys' services is a function he performs year in and year out during his term of service.

The amount of the clients' recovery, running into hundreds of thousands of dollars as it did, affords some measure of the large financial interest at stake at the commencement of the trial and there can be no minimizing the great responsibility the trial imposed upon the attorney. The contract marks the trial off from other services to be performed by the attorney and is compatible with an understanding that he was in a unique and superior position by reason of his experience, skill and ability to conduct the trial. We agree with the court that there would be no fairness in awarding the attorney an ordinary, or even somewhat larger than ordinary, trial per diem. His was expected to be and was an extraordinary service by an unusual expert and his pay for conducting the trial was expected to be on a commensurate scale.

On the other hand the contract limits the amount to be added to the basic fee, by requiring that the stage to which the trial had proceeded be taken into consideration. As the trial was terminated and the case dismissed at a very early stage, the amount of the increase to be made to the

established ⅓ must be fixed at an amount less than 6⅔ per cent of the recovery, which is fair and reasonable for the service to which it is related. We hold, on consideration of the matters the contract requires to be considered, that amount is and should be, declared to be the sum of $6,000.

We have noted from the record that plaintiff in this action sues in his own right and also as assignee from William G. Boatright; that the defendant, Gilbert Carter, Trustee, was also one of the firm of attorneys associated on the employment contract with William G. Boatright, said firm being entitled by the terms of the contract to twenty per cent of the attorneys' fee called for by the contract; and that said firm of attorneys has accepted twenty per cent of ⅓ of the net recovery in full settlement of its claim; that the defendant Commerce Trust Company, a corporation fiscal agent is a stakeholder as to a fund received from the settlement of the *Carter* case; that federal jurisdiction exists by reason of diversity and the requisite amount; and that the judgment appealed from, in terms, directs distribution of said fund.

In order to conform the judgment and decree to our decision that the amount of the additional attorneys' fee the court was required to determine in this action should be reduced to $6,000.00, it is ordered that the judgment and decree as entered be amended as follows, to-wit:

> (1). The declaration in the first paragraph of the judgment and decree that "the fund in the possession of the defendant Commerce Trust Company to the extent of $24,378.71 belongs to plaintiff and that said fund to the extent of $7,077.70 belongs to defendant Gilbert Carter, Trustee, * * *."
>
> be amended to read:
>
> "The fund in the possession of the defendant Commerce Trust Company to the extent of $4,800.00 be-

longs to plaintiff and that said fund to the extent of $26,656.41 belongs to defendant Gilbert Carter, Trustee, * * *."

(2). The order of the second paragraph of the judgment and decree that "the court declares, adjudges and decrees that $24,378.71 of said fund in possession of said defendant Commerce Trust Company shall be by it turned over, paid and delivered to plaintiff, less 77.5 per cent of said fiscal agent's agreed fee for safekeeping and disbursing of said fund, and that $7,077.70 of said fund in possession of said defendant Commerce Trust Company shall be by it turned over, paid and delivered to defendant Gilbert Carter, Trustee, less 22.5 per cent of said fee * * *."

be amended to read:

"The court declares, adjudges and decrees that $4,800.00 of said fund in possession of said defendant Commerce Trust Company shall be by it turned over, paid and delivered to plaintiff, less 15.2 per cent of said fiscal agent's agreed fee for safekeeping and disbursement of said fund and that $26,656.41 of said fund in possession of said defendant Commerce Trust Company shall be by it turned over, paid and delivered to defendant Gilbert Carter, Trustee, less 84.8 per cent of said fee, and that plaintiff is not entitled to recover any interest on said amount of $4,800.00 out of the fund now on deposit with said Commerce Trust Company, and that the costs of this proceeding shall be and hereby are assessed equally against plaintiff and defendant Gilbert Carter, Trustee, and that no costs are assessed against defendant Commerce Trust Company."

As so amended, the judgment and decree is in all respects affirmed. Costs on appeal, including the supplemental record, to be divided 2/5 to appellant and 3/5 to appellee. Remanded with direction.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

Judgment.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15857 - - - - September Term, 1957.

Wednesday, January 22, 1958.

Gilbert Carter, Trustee, Appellant,

vs.

Nick C. Spanos.

Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the declaration in the first paragraph of the judgment and decree of the said District Court entered on May 2, 1957, that "the fund in the possession of the defendant Commerce Trust Company to the extent of $24,378.71 belongs to plaintiff and that said fund to the extent of $7,077.70 belongs to defendant Gilbert Carter, Trustee, * * *." be, and the same is hereby, amended to read: "The fund in the possession of the de-

fendant Commerce Trust Company to the extent of $4,800.00 belongs to plaintiff and that said fund to the extent of $26,656.41 belongs to defendant Gilbert Carter, Trustee, * * *." and that the order of the second paragraph of the said judgment and decree that "the court declares, adjudges and decrees that $24,378.71 of said fund in possession of said defendant Commerce Trust Company shall be by it turned over, paid and delivered to plaintiff, less 77.5 per cent of said fiscal agent's agreed fee for safekeeping and disbursing of said fund, and that $7,077.70 of said fund in possession of said defendant Commerce Trust Company shall be by it turned over, paid and delivered to defendant Gilbert Carter, Trustee, less 22.5 per cent of said fee * * *." be, and the same is hereby, amended to read "The court declares, adjudges and decrees that $4,800.00 of said fund in possession of said defendant Commerce Trust Company shall be by it turned over, paid and delivered to plaintiff, less 15.2 per cent of said fiscal agent's agreed fee for safekeeping and disbursement of said fund and that $26,656.41 of said fund in possession of said defendant Commerce Trust Company shall be by it turned over, paid and delivered to defendant Gilbert Carter, Trustee, less 84.8 per cent of said fee, and that plaintiff is not entitled to recover any interest on said amount of $4,800.00 out of the fund now on deposit with said Commerce Trust Company, and that the costs of this proceeding shall be and hereby are assessed equally against plaintiff and defendant Gilbert Carter, Trustee, and that no costs are assessed against defendant Commerce Trust Company." and, as so amended, the said judgment and decree of said District Court is in all respects hereby affirmed.

Costs on appeal, including supplemental record, are divided two-fifths to appellant and three-fifths to appellee, and appellant having paid the sum of $25.00 to cover Clerk's fees incurred in this Court and the sum of $112.58

for printing his record, and the appellee having paid the sum of $186.00 for printing his supplemental record, making a total of $323.58, the appellant is to pay two-fifths of this amount, or $129.43, and the appellee is to pay three-fifths of this amount, or $194.15. It is therefore now here further Ordered by this Court that the appellant Gilbert Carter, Trustee, have and recover from the appellee Nick C. Spanos the sum of Eight and 15/100 ($8.15) Dollars, being the difference between the amount taxable against the appellee and the amount paid, and have execution therefor.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with direction for proceedings not inconsistent with the opinion of this Court filed on January 16, 1958.

January 22, 1958.

APPENDIX C.

Findings of Fact and Conclusions of Law.

(Filed April 27, 1957.)

The Court finds the facts to be:

That plaintiff is a citizen of the State of California. Defendants are citizens of the State of Missouri. More than $3,000.00 is here involved.

Plaintiff is the lawful assignee of all the right, title and interest of William G. Boatright in and to that certain fund here in dispute and now on deposit with the Commerce Trust Company, as Fiscal Agent, in accordance with a written contract between Gilbert Carter, Trustee, and William G. Boatright, dated March 4, 1955 (Plf's Ex. 2).

By the "Contract of Employment" (Plf's Ex. 1), plaintiff, as an associate of William G. Boatright, and "an additional attorney-of-record" in the case of Carter v. Twentieth Century-Fox, was to be compensated for legal services rendered by him in that litigation out of the attorneys' fees earned and to be paid to William G. Boatright. By agreement between plaintiff and said Boatright (Plf's Ex. 3), plaintiff was duly assigned twenty-five per cent of the net fee accruing to Boatright under the aforesaid contract of employment. Thereafter, Boatright assigned to plaintiff for collection the remaining seventy-five per cent of the fees due and payable to Boatright under the aforesaid employment contract (Plf's Ex. 5), and, upon recovery thereof by plaintiff, plaintiff is obliged to hold the same in trust and pay the amount thereof to Boatright, his heirs or legal assigns.

Plaintiff and William G. Boatright, as Attorneys-of-Record for plaintiff in the Carter case, made intensive preparations before a jury of the issues joined in that litigation. There can be no issue in the instant case that counsel for plaintiff in the Carter case were in anywise derelict in their preparation for trial thereof, nor that said case was not diligently prosecuted by counsel at all stages during its pendency. The pre-trial order entered herein clearly reveals the historical background and the relation of the parties herein to the case of Carter, Trustee, v. Twentieth Century-Fox Film Corporation, and the intensive preparation of counsel in that case. The facts set forth in said pre-trial order are for that purpose hereby incorporated in and made a part of the instant findings of fact made by the Court.

As a direct result of the intensive preparation and commencement of the trial of the Carter case, compromise and settlement thereof was directly effected. Said litigation could not have been compromised and settled by the parties thereto as a separate, individual claim or cause of action prior to the time compromise and settlement thereof was actually effected as a part of a so-called "package deal" referred to in the evidence. It was at the suggestion of Gilbert Carter (Plf's Ex. 18) that the amount of $600,000.00 was set as the sum for which the Carter case should be compromised and settled, as an item of said "package deal" and Gilbert Carter, as Trustee, was fully informed of all the details concerning said transaction and gave written assent thereto (Plf's Ex. 21).

Whether the sum of $600,000.00 would have been the amount of judgment ultimately entered on any verdict of a jury sitting in the trial of the Carter case, of course we cannot definitely say. However, it is fair to state, and the Court so finds, from the facts stated in the pre-trial order

and a consideration of the record made before this Court during the pendency of that case, of which we take judicial notice, that the amount recovered and collected in compromise and settlement thereof fairly represented the amount of actual damages that the plaintiff in the Carter case sustained to the business and property of the Liberty Theatre in Sedalia, Missouri, as such actual damages were subject to being tripled by reason of things forbidden by the antitrust laws of the United States.

The Court further finds that the contract of employment (Plf's Ex. 1) is not ambiguous in any of its terms or provisions. By said contract, the parties intended that whatever compensation was to be ultimately paid to counsel thereunder was to be such as would be fair and reasonable payment for *all* legal services rendered in connection with the institution and prosecution of the claim and cause of action therein referred to; considered as a whole and not fractional.

A fair and reasonable attorneys' fee for the services rendered by William G. Boatright and plaintiff as associate counsel, in the case of Carter v. Twentieth Century-Fox, taking into consideration the legal services rendered, that is, "all consultations, investigation of facts, legal research, preparation of pleadings and briefs—the taking of depositions, examination of witnesses, arguments to juries and courts—and all legal services both before and after the bringing of said suit" and the efforts of counsel "to bring about a satisfactory compromise and settlement" of that litigation after the commencement of the trial thereof, "taking into consideration the stage to which the trial had proceeded and the amount recovered and collected by compromise and settlement thereof," is eighty per cent of thirty-eight and one-half per cent of $589,807.72, the net amount recovered and collected by the plaintiff in the Carter case, or $181,660.77.

Under the terms of plaintiff's Exhibit 2, the sum of $157,282.06 of the total amount received in compromise and settlement of the Carter case was, by agreement of the parties, allocated to be received by William G. Boatright. As a result of such allocation, William G. Boatright is and was entitled to have paid to him out of the funds now on deposit in Commerce Trust Company, as Fiscal Agent, subject to order and decree of this Court herein, the sum of $24,378.71. Plaintiff, as assignee of said Boatright, is entitled to have that sum now paid to him out of the aforesaid fund. Defendant is entitled to receive from Commerce Trust Comp y, out of the fund aforesaid, the sum of $7,077.70.

The fees to be charged by Commerce Trust Company, as Fiscal Agent of the fund here in suit, should be charged proportionately against the distribution to be made therefrom to plaintiff and defendant herein.

Declaration of Law.

The Court declares the law to be:

That the contract of employment between Carter, Trustee, and William G. Boatright (Plf's Ex. 1) is not ambiguous in its terms.

By Section Three of said contract of employment, the parties intended that intensive preparation for trial was to be a factor especially to be considered in determining the amount of attorneys' fees earned by counsel thereunder; that after such intensive preparation had been made and the case proceeded to trial it was the intention of the parties that there would be a further increase in the amount of attorneys' fees, "taking into consideration (the further factor) the stage to which the trial had proceeded." Under said provision of the contract, intensive preparation for trial by counsel, the stage to which the trial had proceeded,

"and the amount recovered and collected by compromise and settlement" are all factors that must be considered in determining the total percentage of attorneys' fees earned by counsel thereunder.

Under the facts above found, plaintiff, as assignee of William G. Boatright, is entitled to receive from Commerce Trust Company, Fiscal Agent, out of the fund here in dispute, the sum of $24,378.71, less his proportionate amount of the Fiscal Agent's fee charged for the safekeeping of said fund; and, defendant herein is entitled to receive from Commerce Trust Company the sum of $7,077.70, less his proportionate amount of the Fiscal Agent's fee charged for the preservation of said fund.

Counsel prepare decree accordingly. It Is So Ordered.

Albert A. Ridge,
Judge.

Dated at Kansas City, Missouri, this 27th day of April, 1957.

Addendum Memorandum.

It is patent from a consideration of the contract of employment (Plf's Ex. 1) that the compensation to be paid to counsel thereunder was to be a total compensation for all legal services rendered, considered as a whole and not fragmentarily as such services were rendered; and, that intensive preparation for trial, the amount recovered and collected, and the stage to which the trial had proceeded are things to be taken into consideration, together with all the other factors usually considered in determining the amount of attorneys' fees to be paid counsel under a contingent fee contract.

It is not necessary to dwell at length upon all the factors to be considered in determining what is a reasonable attorney's fee for services earned under a contingent fee

contract for employment of an attorney. All the parties before the Court are lawyers and such factors should, in reason, be known to them. Suffice to say, that the record in this case clearly establishes that Mr. Boatright and Mr. Spanos are outstanding lawyers, especially qualified to handle anti-trust litigation of the character involved in the Carter case. Any attempted minimization of the representation of the plaintiff in the Carter case by such counsel, or the results obtained by them in compromise and settlement of that litigation, is wholly unjustified and unwarranted. The correspondence of Gilbert Carter with Mr. Boatright before and during the pendency of that litigation manifests a great respect for the capabilities of Mr. Boatright to carry on the successful prosecution of that litigation. There was nothing transpiring or appearing in the record of the Carter case that justifies any diminution of thought on his part concerning that matter.

Defendant Carter concedes that the amount of recovery effected by Mr. Boatright and Mr. Spanos in the Carter case was a substantial sum of money and, reluctant though he be to admit it, the fact is, that the sum received in settlement thereof is and was tantamount to the total judgment that the plaintiff in the Carter case could reasonably have expected, or that the plaintiff therein was entitled to receive, even had judgment been entered on a verdict of the jury in favor of the plaintiff in that litigation.

Carter's attempt to construe the employment contract in question as providing merely for a per diem to be paid to counsel after the commencement of the trial of the Carter case, is not sustained by any manifestation in his contract. The provision of that contract providing as it does for the payment of an increased amount of attorneys' fees after trial had commenced, must be construed with the intent of the parties as expressed and made manifest in the contract, considered as a whole. When so considered, it clearly

appears that the attorneys' fees earned thereunder were to be considered in totality, as one lump sum, and not by services performed by counsel piecemeal. It was the total legal services rendered by counsel to plaintiff in the Carter case that entitled counsel to a contingent fee when "the amount recovered and collected by compromise and settlement" was paid, and not merely things done by them before or after trial of that case had commenced.

It is clear from said contract that if the amount for which the Carter case was settled had been effected immediately before the trial had commenced, there could be no question about the amount of counsel's attorneys' fees payable under the contract. If the amount of such compromise had been the result of a verdict of a jury, and there had been an allowance of attorneys' fees by the Court, counsel would have been entitled to receive thirty-three and one-third per cent of the amount recovered, plus the full amount allowed by the Court and assessed as attorneys' fees. (An allowance of twenty-five per cent of the actual damages recovered in an antitrust case is not unreasonable.) Any such increase in attorneys' fees received by counsel under that contingency would have been attributable to intensive preparation, a complete trial, and amount recovered. In making such an allowance, no court would have considered a per diem for the trial of such a case, separate and apart from all other factors normally considered in making an allowance to attorneys.

It is likewise clear that there is a manifestation in Section Three of the instant contract that the length of trial is a factor that the parties said would be taken into consideration, and which we must take into account, in determining what total amount of attorneys' fee was earned and payable thereunder, and by what amount such total attorneys' fee is to be increased over thirty-three and one-third per cent. Such manifestation cannot be disregarded.

This, notwithstanding the fact that intensive preparation for trial and the maximum amount of damages recovered by a compromise and settlement of the Carter case is clearly established. The norm that the parties said they would use in determining the amount of attorneys' fee earned under the contract when the circumstances here established were shown to exist, is that it would be a "fair and reasonable" attorneys' fee, "taking into consideration the stage to which the trial had progressed," along with all other factors. That presents a question of fact that must be resolved by the Court without doing violence to any of the terms of the contract between the parties.

We think that matter should be resolved by taking into consideration that it is here clearly established that but for the continuation of the trial of the Carter case to a point of submission of that case to a jury, all factors are shown to exist which entitle counsel, by the terms of their contract, to a contingent fee earned of forty per cent of the amount recovered and collected by compromise and settlement thereof. That being so, then the only logical conclusion to be reached because the Carter trial lasted only two days, is that attorneys' fees earned under the contract over and above thirty-three and one-third per cent, must be reduced by a reasonable percentage of that per cent not earned because the trial did not reach the jury. Without any specific equation for determining that matter, I think that the amount of attorneys' fees not so earned under the contract is to be reasonably fixed at one and one-half per cent by which the total attorneys' fee under the contract was to be increased over and above thirty-three and one-third per cent.

It was reasonably estimated that it would take ten to twelve court days for the trial of the Carter case. I think that that was a reasonable estimate and one justified by the record made in the Carter case. If the length of trial

of the Carter case is to be considered, as we think it must, then under the contract of employment the only deduction from the maximum fee of forty per cent earnable under Section Three thereof is that determined by way of consideration of some percentage that was not reasonably earned. This cannot be ascertained by fixing any per diem allowance to counsel for the trial of a case of the character of the Carter case, as defendant would have us do. The contract speaks in percentages and any sum less than a forty per cent fee not earned thereunder must be determined by consideration of a percentage of the whole fee payable thereunder. We take judicial notice that the time consumed in the trial of an artitrust case such as Carter is a minor matter to be considered in determining the allowance to counsel of a total fee for the bringing and prosecution of such an action, and that it is a minor factor considered by clients and attorneys. Intensive preparation of counsel and results obtained by them are the things that make litigation profitable to a client and they all so understand, until the time comes to "pay off."

Any percentage allowance from total attorneys' fees earned under Section Three of the contract, as here made, can only be done after giving attribution to services of counsel rendered in intensive preparation for trial, the stage to which the trial had proceeded, and the amount recovered. Such considerations in the instant case warrant a total fee earned by counsel of thirty-eight and one-half per cent as being reasonable and fair compensation.

The only counsel to be so considered in the Carter case are Mr. Boatright and Mr. Spanos. It is conceded that the separate arrangement made by plaintiff with the law firm of which he is a member, has no bearing upon the instant matter.

Plaintiff is not entitled to interest on the amount of "contingent fee" so determined and to be paid out of the fund here in suit.

APPENDIX D.

Statutes Involved.

RULE 16, FEDERAL RULES OF CIVIL PROCEDURE.

RULE 16

Pre-Trial Procedure; Formulating Issues

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which

actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

RULE 52(a), FEDERAL RULES OF CIVIL PROCEDURE.

RULE 52

Findings by the Court

a. EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b). [Amended, effective March 19, 1948; see 10 Fed. Rules Serv. cxiii.]

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 848.

NICK C. SPANOS, *Petitioner*,

vs.

GILBERT CARTER, TRUSTEE, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GILBERT CARTER, Trustee,
223½ West Cherry Street,
Nevada, Missouri,
Respondent.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 848.

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vs.

GILBERT CARTER, TRUSTEE, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

NATURE OF THE CASE.

The petition does not disclose any "special and important reasons" for review on writ of certiorari, as required by Rule 19. This is not a case involving principles the settlement of which is of importance to the public as distinguished from the parties only, *Rice* v. *Sioux City Memorial Park Cemetery*, 75 S. Ct. 614, 349 U. S. 70, 99 L. Ed. 897. It is a rare and purely episodic case instituted on behalf of two lawyers against their erstwhile client seeking an increase in attorneys' fee, over and above the amount of $196,602.57 conceded by the client, and involving the construction and application of a special contract of employment.

THE ALLEGED CONFLICT OF DECISIONS.

Petitioner seeks to create the illusion of a conflict between the decision in this case and that of the 9th Circuit in another case on the same matter, namely, construction and application of that portion of Rule 52 (a) of the Federal Rules of Civil Procedure treating of the setting aside of findings of fact in non-jury or jury-waived cases. In the instant case the Court of Appeals did not even discuss the "clearly erroneous" feature of Rule 52 (a), so it hardly could be considered that its decision was inconsistent with any other decision on that subject.

Petitioner, at page 13 of the petition, dwells upon an alleged conflict between decisions in the 3rd and 5th Circuits and those of the 9th Circuit. This case is in the 8th Circuit. Moreover, the alleged conflict simply does not exist; the decisions of all the Courts of Appeals are, essentially, in agreement on the interpretation of 52 (a). It happens but rarely, and then inadvertently by inexact expression, that a judge of a Court of Appeals strikes a discordant note in the great symphony of uniform construction of that rule.

In searching for the meaning of that portion of 52 (a) that treats of appellate review of fact findings, there is encountered a wealth of authority—not a dearth thereof as contended by petitioner. A leading case is *U. S. v. U. S. Gypsum Company*, 333 U. S. 364, 394, 395, 68 S. Ct. 525, 92 L. ed. 746, 765, 766, where this Court, construing and applying 52 (a), said:

> "That rule prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.' It was intended, in all actions tried

> upon the facts without a jury, to make applicable the then prevailing equity practice. * * * The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the Appellate Court. Findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Thus, this Court not only stated the test to be applied in determining whether findings were "clearly erroneous" but also stated the source of the rule and explained its underlying theory. It is that exposition of the rationale or basis of the rule that accommodates some special and sound limitations or exceptions to which petitioner apparently cannot become reconciled. For instance, in the Gypsum case this Court said, 333 U. S. l. c. 396, 92 L. ed. l. c. 766—

> "Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact."

In *Republic Pictures Corporation* v. *Rogers*, (9th Cir.) 213 F. 2d 662, it was decided that in ascertaining whether contracts were ambiguous and in interpreting contracts, the Court of Appeals was not bound by the trial court's findings, since such matters were questions of law. In *Brown* v. *Cowden Live Stock Company*, (9th Cir.) 187 F. 2d 1015, it was held that where the trial court's findings were as to the effect of certain transactions rather than findings which resolve disputed facts, the Court of Appeals was not obstructed by the traditional rule not to disturb the trial court's findings of fact but was free to make its own determination as to the legal conclusion to be drawn. In

Smallfield v. *Home Insurance Company*, (9th Cir.) 244 F. 2d 337, cited by petitioner, the Court recognized the rule that findings of fact induced by an error of law are not binding. To the same effect is *Allis Chalmers Mfg. Co.* v. *Wichman*, (8th Cir.) 220 F. 2d 426, where it was held that the rule that a reviewing court will not disturb findings of fact unless they are clearly erroneous does not apply if the trial judge has committed an error of law which has manifestly influenced or controlled his findings of fact.

That the 8th Circuit has not abandoned Rule 52 (a) is demonstrated by *Wilson* v. *New York Life Insurance Company*, 250 F. 2d 649, which was argued in the Court of Appeals the same day and before the same judges as the instant case and in which the Court said (l. c. 651) "The findings of the Court are presumptively correct and will not be set aside unless clearly erroneous." It would be difficult to find a rule more widely applied or more uniformly construed than this one, as demonstrated by decisions too numerous to mention in all the judicial circuits. The 9th Circuit, which petitioner contends is handing down decisions conflicting with those of other circuits, actually is very much in line. As the Court of Appeals for that circuit tersely, but adequately, observed, in *Wells* v. *J. C. Penney Company*, 250 F. 2d 221, 225, "The trial below having been by the District Court without a jury findings of fact should not be set aside unless clearly erroneous."

In *Randall Foundation* v. *Riddell*, 244 F. 2d 803 (9th Cir.), cited by petitioner, the Court simply invoked Rule 52 (a) and, obviously, did not deem the trial court's findings of fact "clearly erroneous". In that case, as indicated by excerpt from the opinion at page 13 of the petition, the Court rejected the appellant's argument that it must "disregard" the findings of the trial court. Of course, such findings must always be considered or regarded, not dis-

regarded, in order for the Court of Appeals to determine whether they are to be accepted or set aside, according to the well established rules.

Even if there is a conflict of decisions with respect to Rule 52 (a) (which respondent denies) the instant case is not an exemplification of it. The question or issue presented to the Court of Appeals in this case was one of law (construction of employment contract) or one of mixed law and fact (construction coupled with practical application of the contract). If the district court's fixing of the additional fee under the contract were regarded as purely a finding of fact (which it is not) the Court of Appeals obviously deemed it clearly erroneous, as it was empowered to do without being obliged to label it as such. The Court's use of the words "clearly erroneous" is not required by law or rule; when those words are employed it usually is for the purpose of invoking Rule 52 (a) as justification for declining to set aside a finding of fact. What the petition really amounts to is a complaint that the Court of Appeals did not laboriously turn out a lengthy and tedious disquisition on the meaning and operation of Rule 52 (a) in its relation to findings of fact. But that portion of the rule is so generally and well understood and so uniformly construed that it need not even be mentioned. Moreover, petitioner assumes but has failed to demonstrate that the Court of Appeals did set aside any fact finding that was eligible for the "clearly erroneous" test.

Petitioner, at page 15 of the petition, quotes and attaches great significance to certain language employed by the Court of Appeals, and says it was used with reference to a question of fact. What escapes petitioner is that the Court, as clearly indicated by the words "applying the limitations and criteria of the contract" (petition, appendix 7a), referred to a question of law, or perhaps mixed law

and fact, not a question of fact; and that the Court said "determinable", not "determined", giving rise to the inescapable inference that the actual determination somehow went off on something other than the "informed judgment of the experienced judge, applying the limitations and criteria of the contract" and was induced, no doubt, by erroneous conclusions of law, namely, misinterpretation and misapplication of the contract, for when the Court of Appeals considered the "matters the contract required to be considered" (petition appendix 8a) it reached a quite different conclusion. What the Court of Appeals rejected appears to be anything but a finding of fact within the ambit of 52 (a). If it was not purely a conclusion of law, it might be regarded as mixed law and fact, or a finding induced by an erroneous conclusion of law. Finally, if the reviewing Court needed to find it "clearly erroneous" it obviously did so, in view of its very drastic modification of the trial court's judgment.

As already noted, petitioner complains of the setting aside of District Court's findings of fact and of new fact findings made by the Court of Appeals, but does not identify any of them. It is apparent from stipulated and agreed facts embodied in the pre-trial order (R. 12-14) that the decision of the Court of Appeals could be, and presumably was, based on and justified by essential facts that were uncontroverted, and that it did not ne essarily involve the setting aside of any fact finding of the type properly embraced by Rule 52 (a), much less the making of any new finding of fact. However, if this Court deems it necessary, in order to rule on the petition for certiorari, to determine more precisely what points the Court of Appeals was called upon to review, in particular the fact findings questioned on appeal, and which fact findings if any of the 52 (a) variety that Court was obliged to, or might have, set aside

in order to decide those points or to reach its decision, respondent respectfully urges the Court to call for and peruse the briefs that were filed in the Court of Appeals. In that connection, the Court of Appeals observed (petition, appendix 6a): "It is contended for the client that the court erred in interpreting and applying the employment contract * * *" Then, relative to the proper amount of the fee increase, the Court said (page 8a): "We hold, on consideration of the matters the contract required to be considered, that amount is and should be declared to be the sum of $6,000."

ALLEGED DEPARTURE FROM NORMAL PROCEDURE.

From what has already been said, it is quite clear that the Court of Appeals did not make any new findings of fact of the Rule 52 (a) type—so there is nothing to petitioner's contention that it did so.

It is fundamental and elementary in our system of jurisprudence that an appellate court may reverse or modify the judgment of a lower court. It follows that in the accepted and usual course of judicial proceedings the Federal District Court will, or should, be guided by the rules and principles of law laid down by the Court of Appeals for its circuit, not inconsistent with decisions of this Court. But in this case both petitioner and the District Court saw fit to ignore a decision of the Court of Appeals for the 8th Circuit containing enunciations that were very much in point and of controlling significance, namely, *20th Century-Fox Film Corporation* v. *Brookside Theatre Corporation*, 194 F. 2d 846. In that case, an anti-trust suit like the Carter case against substantially the same defendants, William G. Boatright and his alter ego, Nick C. Spanos, petitioner here, as

attorneys for plaintiff were allowed a fee of $150,000.00 by the trial court. The Court of Appeals pared it down to $100,000.00, for all services including a lengthy trial and the appeal, and in doing so said, l. c. 859:

> "The statute provides for the recovery of 'reasonable' attorney fees. Such fees are not to be calculated on the basis of a contingent fee. But even if so calculated, 40% of the amount of the verdict in this case would, in our opinion, if to be paid out of the amount of damages recovered, shock the conscience * * *"

When the instant case came before the Court of Appeals, involving the same attorneys and the same type of suit, the Court decided it consistently with what it had said (and of which the attorneys were so well aware) in Brookside. That can hardly be regarded as a departure from the accepted and usual course of judicial proceedings. It is nothing more than the exercise of power conferred by *28 U. S. C. A. 2106.*

While complaining of alleged departure from proper procedure, petitioner undertakes, at page 16 of the petition, to argue this case on the merits by contending that "trial" as occurring in paragraph 3 of the contract (R. 17) includes pre-trial (despite its prefix meaning "before", and the ordinary sense of the word "trial"). There is much respondent could say on that subject, but it would appear to be out of place on this occasion.

In much the same vein are the questions or "propositions" propounded by petitioner at pages 3 and 4 of the petition, which appear to be either moot or to go to the merits.

CONCLUSION.

There is no conflict of decisions between the Courts of Appeals such as that for which petitioner contends. If respondent is mistaken in this, the conflict is insignificant, not "real and embarrassing". *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U. S. 70, 79, 99 L. Ed. 897, 904, 75 S. Ct. 614. There is nothing in this case to indicate the Court of Appeals engaged in or sanctioned any departure from the accepted and usual course of judicial proceedings. The alleged conflict and departure are figments of petitioner's imagination or, more likely, hollow devices conceived in frustration, mantled with speciosity and launched in desperation. Petitioner conjures this Court to conjure up a phantom conflict or departure by which to justify its review of this case, in the hope that somehow this Court might then be persuaded to relieve the attorneys from the extreme disappointment and embarrassment begotten them by the ill-conceived and exorbitant demand they made upon their client. The petition is frivolous. Its filing was utterly unjustified. Wherefore, respondent prays reasonable damages for the delay thereby occasioned him. *Rule* 564.

Respectfully submitted,

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